

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Communication Innovators Petition for  
Declaratory Ruling

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CG Docket 02-278

**COMMENTS OF THE U.S. CHAMBER OF COMMERCE**

William L. Kovacs  
Senior Vice President, Environment,  
Technology & Regulatory Affairs  
U.S. Chamber of Commerce  
1615 H Street, NW  
Washington, DC 20062-2000  
(202) 463-5457  
wkovacs@uschamber.com

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## **Executive Summary**

The U.S. Chamber of Commerce (“Chamber”) supports Commission action that provides greater clarity regarding the obligations of calling parties under the Telephone Consumer Protection Act (“TCPA”). In particular, the Chamber welcomes clarification that the term “capacity” within the TCPA’s definition of an automatic telephone dialing system (“autodialer”) means “present capacity” when such a system is used to place non-telemarketing, informational calls.

This clarification is important because technological advances may subject an increasing number of devices to the Commission’s autodialer obligations. And because such requirements impact calls made to mobile phone numbers, these obligations restrict non-telemarketing calls to what is becoming the primary means of communication for millions of American consumers.

Since Congress enacted the TCPA in 1991, consumer usage of mobile phones has exploded. Today, mobile phones are the primary communication device for over half of Americans nationwide. Dramatically increasing mobile phone use, along with the increased sophistication of mobile devices, has prompted a significant shift in consumer expectations. Now, consumers expect – indeed, demand – that companies with whom they do business will pro-actively provide consumers with important updates instantly, wherever they are. The way to do this, of course, is through the consumer’s mobile device. Businesses are responding to this demand, providing a wide array of valuable informational calls, and the Commission has already recognized that consumers find these informational updates “highly desirable.”

In contrast to these informational calls that consumers want, Congress enacted the TCPA to curtail a very different type of call – unsolicited telemarketing calls. While the Commission rightly distinguished between these two types of calls in a recent order, TCPA plaintiffs’ lawyers refuse to do so. Instead, these lawyers are bringing an avalanche of multi-million dollar class

action suits against legitimate businesses providing informational, non-telemarketing commercial messages to consumers. These lawsuits are having a significant deterrent effect on American businesses that otherwise want to respond to consumers' desire to receive timely updates about their products, services, and accounts.

To address this problem, the Chamber supports a two-step solution. First, the Commission should clarify that “capacity,” as used in the TCPA’s autodialer definition, means “present capacity.” This reading is supported by the term’s ordinary meaning, by its use in context, and by the canon against surplusage. Second, the Commission should restrict its reading of “capacity” as “present capacity” to informational calls. Doing so would permit businesses to place the many valuable informational calls that consumers now demand and that the Commission has recognized as important, while continuing to protect consumers from unsolicited telemarketing calls. Moreover, this result would continue the Commission’s practice of distinguishing between informational and telemarketing calls for purposes of the TCPA, and ensuring that informational calls are subject to less burdensome requirements.

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The U.S. Chamber of Commerce (“Chamber”)<sup>1</sup> respectfully submits the following comments in response to the Public Notice, issued October 16, 2012, requesting comment on the Petition for Declaratory Ruling filed by Communication Innovators (“CI Petition”) in the above-referenced docket. For the reasons described below, the Chamber supports Commission action that removes deterrents on businesses that seek to communicate with consumers for non-telemarketing purposes. In particular, the Chamber urges the Commission to clarify that “capacity” in the Telephone Consumer Protection Act (“TCPA”)<sup>2</sup> means “present capacity,” not “future capacity,” with respect to informational, non-telemarketing commercial calls.

## **I. BACKGROUND**

The issues raised in the CI Petition highlight the differences between the types of calls that consumers today expect to receive, and those calls that Congress originally targeted in enacting the TCPA. Consumers expect businesses to provide them with real-time, non-marketing information regarding their existing products, accounts, and services. In passing the TCPA, in contrast, Congress targeted a very different type of calls: unsolicited telemarketing calls.

### **A. Consumers Value and Demand Informational Calls.**

Today’s communications industry is vastly different from the industry that existed when Congress enacted the TCPA. The Commission’s own data underscores the explosion of mobile phone usage and a corresponding decrease in wireline usage. The pervasiveness of mobile phones, consumers’ increasing reliance on them as a primary means of communication, and the growing sophistication of these devices have fueled changing usage patterns and consumer expectations. Where once mail, television, and wireline calls were the primary means by which

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<sup>1</sup> The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

<sup>2</sup> 47 U.S.C. § 227.

consumers obtained information, consumers now expect to be updated on important information instantly, wherever they are, through their mobile devices, as shown during Hurricane Sandy.

1. Wireless usage has exploded.

There can be no dispute about the dramatic rise in consumers' mobile phone usage. When Congress enacted the TCPA, the mobile wireless industry was in its infancy. Whereas mobile phone service was once considered a luxury, and landlines were consumers' primary telecommunication device, today the situation is reversed. In the Commission's own words, "wireless use has expanded tremendously since passage of the TCPA in 1991."<sup>3</sup>

When the TCPA was passed, there were fewer than 7.5 million wireless subscribers nationwide.<sup>4</sup> The few mobile phones that did exist were mostly bulky devices,<sup>5</sup> not the small, sleek devices most consumers carry today. Those consumers that did have a mobile phone paid a high price for it. The best price for the popular 60-minute per month plan in Los Angeles was approximately \$63 per month, or more than \$1.00 per minute.<sup>6</sup>

Today, the telecommunications world is starkly different. At the end of 2011, there were 321 million wireless subscriber connections, more than one connection for each American.<sup>7</sup> Increasingly, consumers are opting for wireless devices as their primary communication device. More than one-third of all households have "cut the cord" and have no wireline service, a number that continues to grow.<sup>8</sup> Moreover, nearly a third of those consumers that have both a wireline and wireless phone reside in "wireless-mostly" households, receiving all or nearly all of

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<sup>3</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("2012 TCPA Order"), 55 Communications Reg. (P&F) 356, ¶ 29 (2012).

<sup>4</sup> *In re Implementation Of Section 6002(B) Of The Omnibus Budget Reconciliation Act Of 1993*, 10 F.C.C. Rcd. 8844, Table 1 (1995).

<sup>5</sup> *Id.* ¶ 21 (noting that by 1995 hand-held mobile phones finally had become half of all cellular phones sold).

<sup>6</sup> *Id.* Tables 3-4.

<sup>7</sup> See CTIA, *Wireless Quick Facts*, at [http://ctia.org/media/industry\\_info/index.cfm/AID/10323](http://ctia.org/media/industry_info/index.cfm/AID/10323) (last accessed Nov. 15, 2012).

<sup>8</sup> Centers for Disease Control and Prevention, Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2011*, at 2 (June 2012).

their calls on their wireless device.<sup>9</sup> Together, “wireless-only” and “wireless-mostly” households, concepts unheard of a decade ago, account for more than half of all Americans.

Consumers are also doing far more with their wireless devices today. Once just capable of calls from automobiles, today’s mobile phones offer a wide array of methods of communication, from voice calls, to text messaging, internet searches, email access, and even video chat. It is no surprise, therefore, that smart-phone and data-usage has exploded. Over two-thirds of American adults used some type of non-voice mobile data service in 2009.<sup>10</sup> In 2010, over 40 percent of American adults used their mobile phone to go online.<sup>11</sup> The number of smart-phones continues to grow, with 44% of mobile subscribers using smart-phones today.<sup>12</sup>

## 2. Consumers’ expectations have shifted.

The increased adoption of wireless communications has transformed consumers’ expectations. Now with the ability to send and receive constant streams of information wherever they go, consumers want to use those capabilities to keep them better informed. In particular, consumers are increasingly demanding the ability to receive real-time, non-marketing information from the companies with which they do business. Again in the Commission’s own words, “wireless services offer access to information that consumers find highly desirable,” and businesses providing this information offer “services on which consumers have come to rely.”<sup>13</sup>

Today, over half of mobile-phone users rely on their mobile device to access information they need right away.<sup>14</sup> American businesses have responded to these new consumer desires and expectations with a variety of tools for consumers to obtain and receive timely information via

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<sup>9</sup> *Id.* at 4.

<sup>10</sup> *See In re Implementation Of Section 6002(B) Of The Omnibus Budget Reconciliation Act Of 1993*, 26 F.C.C.R. 9664, 9674, ¶ 164 (2011) (CTIA estimate for 2009).

<sup>11</sup> *Id.*

<sup>12</sup> Nielsen, *The Mobile Media Report: State of the Media*, at 5 (Q3 2011).

<sup>13</sup> *2012 TCPA Order* ¶ 29.

<sup>14</sup> Pew Research Center, Aaron Smith, *Americans and Their Cell Phones*, at 2 (Aug. 15, 2011).

their mobile devices. Most obviously, significant numbers of businesses are now offering mobile versions of their websites, and over half of consumers have indicated they are more likely to purchase from companies with mobile websites.<sup>15</sup> Eighteen percent of mobile-phone users, including thirty-seven percent of smart-phone users, utilize their phone for online banking, and non-white minorities are even more likely to do so.<sup>16</sup> Businesses have also developed applications to communicate with customers using text-messages.<sup>17</sup>

Not only do customers want to obtain information via their mobile devices, but they also expect companies to be pro-active about providing important information on a timely basis. As the Commission recently recognized, these calls include “bank account balance, credit card fraud alert, package delivery, and school closing information.”<sup>18</sup> Far from being intrusive, these calls, according to the Commission, are “highly desirable.”<sup>19</sup>

In many cases, consumers desire (and expect) to receive these informational communications even when they have no prior relationship with the business involved. The recipient of a package benefits from receiving delivery notifications from a parcel service.<sup>20</sup> Similarly, a bank may offer to notify the bank customer’s customer that funds have been sent or received. A friend may request that a retailer send an electronic gift certificate or an E-card to a recipient’s phone number. Or a family member may ask a school to contact other family members regarding scheduling information. To be successful in this new communications world, American businesses of all types need to continue to respond to this increasing consumer demand for pro-active informational updates by offering these and other services.

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<sup>15</sup> Luth Research, *Supply & Demand of the Mobile Web for Retail* (Nov. 16, 2010).

<sup>16</sup> *Americans and Their Cell Phones*, at 3, 5, 7.

<sup>17</sup> See, e.g., Wells Fargo, *Mobile Banking*, at <https://www.wellsfargo.com/mobile/> (“Text banking is a free service which allows you to quickly request and receive account information via text message.”).

<sup>18</sup> 2012 TCPA Order ¶ 21.

<sup>19</sup> *Id.* ¶ 29.

<sup>20</sup> See *Cargo Airline Ass’n, Pet. for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Aug. 17, 2012).

**B. Plaintiffs' Lawyers Are Abusing the TCPA and Inhibiting Valuable Informational Calls to Consumers.**

Given the value to consumers of informational, non-telemarketing commercial calls, the Commission recognized in its *2012 TCPA Order* that informational calls should to be subject to different regulatory treatment than telemarketing calls.<sup>21</sup> Unfortunately for American consumers and businesses, plaintiffs' lawyers have not arrived at the same conclusion. Instead, these lawyers, seeking ever growing fee awards, are continuing to sue a variety of American businesses that provide informational calls to consumers.

As the Commission is well aware, the TCPA contains a private right of action.<sup>22</sup> In essence, this private right of action creates a strict-liability regime for calls to wireless phones using automatic telephone dialing systems, permitting suits for statutory damages of \$500 per call. The combination of this statutory damages provision and the regular nature of businesses' interaction with consumers has made the TCPA a frequent target for class action plaintiffs' lawyers. Between 2008 and 2011, federal lawsuits brought under the TCPA increased by more than 500 percent.<sup>23</sup> The majority of TCPA federal lawsuits ever filed were filed after January 1, 2010.<sup>24</sup> The number of federal class-action TCPA lawsuits – which seek millions of dollars in aggregate damages – has increased six-fold since 2008.<sup>25</sup>

This increase in litigation is being driven by opportunistic plaintiffs' firms seeking attorneys' fees, not by aggrieved consumers. Just a few law firms account for the majority of TCPA class actions filed. Judges have criticized one such firm for requesting large fees upon settlement of a case, despite "boilerplate complaint[s] that Plaintiff's counsel need only amend

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<sup>21</sup> See *2012 TCPA Order* ¶ 29.

<sup>22</sup> 47 U.S.C. § 227(b)(3).

<sup>23</sup> See CI Petition at 15.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 14-15.

slightly in each case it files alleging a TCPA violation.”<sup>26</sup> For instance, in *Bellows v. NCO Financial Systems, Inc.*, that firm and other class action plaintiffs’ lawyers took home over \$300,000 in fees, after providing a mere \$2,030 in consumer recoveries.<sup>27</sup> And more recently, in *Adams v. AllianceOne, Inc.*,<sup>28</sup> that same firm, other plaintiffs’ lawyers, and settlement administrators received more than \$5.5 million, more than twice as much as the settlement provided to consumers. These attorneys are now targeting informational calls and thereby deterring American businesses from fully informing consumers about existing products, services, and accounts.

For instance, a number of TCPA class actions have been brought against companies that provide confirmatory messages when a consumer opts out of receiving additional text messages. The targets of these suits are not telemarketers, but entities such as Twitter, Facebook, the NFL, Redbox, and American Express.<sup>29</sup> As these suits illustrate, TCPA plaintiffs’ lawyers refuse to distinguish, as the Commission has, between informational and telemarketing calls.

These suits create a number of problems. First, businesses face the significant cost of defending against these suits, which are often not resolved until summary judgment after months of expensive discovery.<sup>30</sup> Second, as courts and practitioners have noted, the combination of

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<sup>26</sup> See *Lo v. Oxnard European Motors, LLC*, No. 11-cv-1009, 2011 WL 6300050, at \*7 n.3 (S.D. Cal. Dec. 15, 2011) (collecting cases).

<sup>27</sup> See *Bellows v. NCO Fin. Sys., Inc.*, No. 07-cv-1413 (S.D. Cal. filed Apr. 14, 2011). The settlement permitted a recovery of \$70 per consumer, up to a total of \$950,000, but only 29 individuals ever filed claims.

<sup>28</sup> See Order, Dkt. No. 137, *Adams v. AllianceOne, Inc.*, No. 08-cv-0248 (S.D. Cal. Sept. 28, 2012).

<sup>29</sup> See, e.g., *Moss et al. v. Twitter, Inc.*, No. 11-cv-0906 (S.D. Cal. filed Apr. 28, 2011); *Noorpavar v. Myspace, Inc.*, No. 11-cv-0903 (S.D. Cal. filed Apr. 28, 2011); *Lo v. Facebook, Inc.*, No. 11-cv-0901 (S.D. Cal. filed Apr. 28, 2011); *Maleksaeedi v. Am. Express Centurion Bank*, No. 11-cv-0790 (S.D. Cal. filed Apr. 14, 2011); *Emanuel v. NFL Enterprises, LLC*, No. 11-cv-1781 (S.D. Cal. filed Apr. 17, 2011); *Holt v. Redbox Automated Retail, LLC*, No. 11-cv-3046 (S.D. Cal. filed Dec. 30, 2011).

<sup>30</sup> For example, in *Ryabyshchuck v. Citibank (South Dakota) N.A.*, No. 11-cv-1236 (S.D. Cal. filed June 6, 2011), the plaintiff’s initial complaint noted that he had provided his number to the caller in a credit card application. When the defendant moved to dismiss on the ground that this evidenced the plaintiff’s prior consent, the plaintiff submitted a new complaint deleting this reference and then successfully argued that factual issues of consent precluded granting the motion to dismiss. It was not until nearly a year later that the defendant was able to win the suit on summary judgment, after again showing that the plaintiff indeed provided his number as originally alleged.

statutory damages (as in the TCPA) and the class-action device amounts to a “perfect storm.”<sup>31</sup> That “perfect storm” allows for damages demands so high as to force defendants to “stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even though they have no legal liability.”<sup>32</sup> The fear of such “annihilating damages” can deter companies from engaging with consumers as described above. Moreover, “[t]he mere threat of a ‘potentially enormous aggregate recovery for plaintiffs’ raises concerns about ‘an *in terrorem* effect on defendants, which may induce unfair settlements.’”<sup>33</sup> Even TCPA plaintiffs’ lawyers themselves acknowledge this fact in arguing for court approvals of lower settlements.<sup>34</sup>

Nor is it sufficient to say that businesses should manually dial these calls in order to avoid TCPA liability. Initially, manually dialed calls are subject to increased error rates and expense, reducing the value ultimately provided to the consumer.<sup>35</sup> Moreover, TCPA plaintiffs’ lawyers are now arguing that even manually dialing a non-telemarketing call is no defense to TCPA liability.<sup>36</sup> The argument, according to these lawyers, is that, because the TCPA looks only at the “capacity” of the equipment used to place the call, not how the equipment was actually used, modern business telephones qualify as “automatic telephone dialing systems” even when placing manually dialed calls.<sup>37</sup> In short, these attorneys now argue that the TCPA governs *every* call a business places, without exception.

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<sup>31</sup> *Sittlmock v. Weis Mkts., Inc.*, 385 F. App’x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

<sup>32</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

<sup>33</sup> John Nadolenco, Archis A. Parasharmi & Joseph P. Minta, *Too High A Price? The Perilous Combination Of Statutory Damages And Class Certification*, 18 No. 1 Westlaw Journal Class Action 1, 3 (2011) (quoting *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003)).

<sup>34</sup> See Class Counsel’s Opp. to Objs. To Final Approval of Class Action Settlement, at 4, Dkt. No. 125, *Adams v. AllianceOne, Inc.*, No. 08-cv-0248 (S.D. Cal. Aug. 22, 2012) (“[C]ourts often view statutory damages claims with alarm because of the overwhelming liability exposure they can create when consolidated in a class action.”).

<sup>35</sup> See CI Petition at 19-20.

<sup>36</sup> See *Mudgett v. Navy Fed. Credit Union*, No. 11-cv-039, 2012 WL 870758 (E.D. Wis. Mar. 13, 2012); *Dobbin v. Wells Fargo Auto Fin., Inc.*, No. 10-cv-268, 2011 WL 2446566 (N.D. Ill. June 14, 2011).

<sup>37</sup> See Pl.’s Br. in Opp. to Def. Navy Federal Credit Union’s Mot. for Summ. J., Dkt. No. 33, at 9, *Mudgett v. Navy Federal Credit Union*, No. 11-cv-039 (filed Nov. 8, 2011); Pls.’ Resp. to WFAF’s Mot. for Summ. J., Dkt. No. 116,

American companies need certainty to communicate with their customers. Specifically, they need clear rules regarding when their communications will subject them to liability under the TCPA. However, with plaintiffs’ lawyers targeting “highly desirable”<sup>38</sup> informational calls, and offering never-before-seen theories of statutory interpretation in the course of such suits, businesses are being deterred from responding to consumer demands. The result is less satisfied consumers and less competitive American businesses. The Chamber supports Commission action that will clarify the Commission’s interpretation of the term “capacity,” and continue to distinguish between informational and telemarketing calls, restoring American businesses’ ability to respond to consumer demand and keep consumers informed about their existing products, services, and accounts.

## **II. DISCUSSION**

As the Chamber has explained in prior comments,<sup>39</sup> the Commission should issue a declaratory ruling clarifying that “capacity” means “present capacity” when used in the TCPA and the Commission’s regulations with respect to informational calls.<sup>40</sup> By limiting the definition of “capacity” to “present capacity” for informational calls only, the Commission will be able both to continue to prevent unsolicited telemarketing calls and to remove the existing deterrent on American businesses who want to provide the informational calls consumers now demand.

### **A. The Commission Should Clarify that “Capacity” Means “Present Capacity.”**

“As with any question of statutory interpretation, [the Commission’s] analysis [should] begin . . . with the plain language of the statute.”<sup>41</sup> As the Commission has acknowledged, “[i]f the intent of Congress is clear, that is the end of the matter; for . . . the agency . . . must give

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at 1, *Dobbin v. Wells Fargo Auto Fin., Inc.*, No. 10-cv-268 (filed Mar. 23, 2011).

<sup>38</sup> 2012 TCPA Order ¶ 29.

<sup>39</sup> See Comments of the U.S. Chamber of Commerce, CG Docket No. 02-278 (filed Aug. 30, 2012).

<sup>40</sup> See CI Petition at 16-18 (requesting this relief).

<sup>41</sup> *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

effect to the unambiguously expressed intent of Congress.”<sup>42</sup> The Commission “must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>43</sup> Here, the TCPA, by its language, applies only to “equipment which *has the capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>44</sup> This language plainly excludes equipment which, only with substantial subsequent modifications, would gain the ability to store or produce randomly or sequentially generated numbers, and then to dial those numbers. Businesses wish to use automated dialing systems that access databases of their own customers to update customers about their existing products, services, and accounts; the numbers are not randomly or sequentially stored or produced.

In examining the plain language of a word like “capacity,” courts look to both “the word’s ordinary intrinsic meaning and . . . its use in context.”<sup>45</sup> After doing so with respect to a similar statute, the Fourth Circuit concluded that “capacity” meant “present capacity” and rejected the contrary claim, which asserted that “[c]apacity,” the argument runs, necessarily imports futurity; it means in this context the ability of a mark continuously over future time to ‘identify and distinguish,’ even if it has not yet suffered any lessening of that ability.”<sup>46</sup> The Fourth Circuit’s analysis applies with equal force here.

First, the term’s “ordinary intrinsic meaning” only encompasses “present capacity.” Examples are legion:

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<sup>42</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also *In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act Of 2004 Reciprocal Bargaining Obligation*, 20 F.C.C. Rcd. 10339, ¶ 27 (2005) (“Here, we believe that the statute is clear on its face and we must give effect to its plain meaning.” (citing *Chevron*, 467 U.S. at 842)).

<sup>43</sup> *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

<sup>44</sup> 47 U.S.C. § 227(a)(1) (emphasis added).

<sup>45</sup> *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 460 (4th Cir. 1999), *superseded by statute*, Trademark Dilution Revision Act, Pub. L. No. 109-312, 120 Stat. 1730 (2006).

<sup>46</sup> *Id.*; see also *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 432-34 (2003) (holding that “actual dilution” rather than a “likelihood of dilution” was required).

- “Stadium capacity” means the current number of seats a stadium can hold.
- “Excess capacity” means currently available but unused resources.<sup>47</sup>
- “Mental capacity” means a current ability to understand the meaning of events.<sup>48</sup>
- “Fiduciary capacity” means a current obligation to act in another’s best interest.<sup>49</sup>
- “Operating capacity” means the current maximum amount a facility can accommodate.<sup>50</sup>
- “Carrying capacity” means a location’s current tolerance for a particular activity.<sup>51</sup>

Absent evidence to the contrary, the Commission should assume that Congress intended to again use the word “capacity” consistent with this ordinary meaning.<sup>52</sup>

Turning to the word’s “use in context,” this result is confirmed. The TCPA speaks in terms of equipment that “*has* the capacity,” not equipment that “will have the capacity” or “could have the capacity” once additional modifications are made. As the Supreme Court has concluded, “Congress’ use of a verb tense is significant in construing statutes.”<sup>53</sup> Indeed, the Fifth Circuit has found significant another statute’s use of the present-tense “has.” In *In re Ran*, the court interpreted a provision examining whether a taxpayer “has an establishment” in a

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<sup>47</sup> See *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995) (“Excess capacity is the capacity of the rivals in a market to produce more than the market demands at a competitive price.”).

<sup>48</sup> See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”)

<sup>49</sup> See, e.g., *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2327-28 (2011) (distinguishing between “personal” and “fiduciary” capacity).

<sup>50</sup> *In re Mirant Corp.*, 332 B.R. 139, 148 n.13 (Bankr. N.D. Tex. 2005).

<sup>51</sup> See *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1028 (9th Cir. 2008) (discussing National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982)).

<sup>52</sup> *FCC v. AT&T Inc.*, 131 S.Ct. 1177, 1182 (2011) (“When a statute does not define a term, we typically give the phrase its ordinary meaning.” (internal quotation marks omitted)). One commenter has previously asserted that “English words can have many meanings, and stadium capacity is not what Congress was interested in.” Reply Comments of Gerald Roylance, CG Docket No. 02-278, at 8 (filed Sept. 10, 2012). While words may indeed have multiple meanings, the rules of statutory interpretation indicate how such conflicting definitions are to be resolved. In this case, the term’s “use in context” and the canon against surplusage confirm that the term “capacity” means “present capacity.” The commenter offers no evidence to the contrary. A few commenters have relied on a truncated excerpt of legislative history from another bill, H.R. 2921, to argue to the contrary. See, e.g., Comments of Brian Glauser, CG Docket No. 02-278, at 15 (filed Sept. 6, 2012) (quoting H.R. Rep. No. 101-633 (1990), *available at* 1990 WL 259268); Comments of Robert Biggerstaff, CG Docket No. 02-278, at 5 (filed Aug. 30, 2012) (same); Comments of Joe Shield, CG Docket No. 02-278, at 1-2 (filed Aug. 30, 2012) (same). The Chamber notes that the full quotation of H.R. Rep. No. 101-633 (1990), *available at* 1990 WL 259268, supports its position, as the report states that the bill only targeted “active use” of equipment’s autodialing capabilities. *Id.* a \*5.

<sup>53</sup> *United States v. Wilson*, 503 U.S. 329, 333 (1992).

foreign country. Rejecting a claim that a taxpayer could later create an establishment and thereby trigger the statute, the court held that the use of the present tense verb “has” was controlling.<sup>54</sup>

The same analysis applies to the TCPA.

Finally, the Commission should clarify that “capacity” means “present capacity” in order to follow the interpretive canon against surplusage. This rule applies with additional force here, “when the term occupies so pivotal a place in the statutory scheme.”<sup>55</sup> The TCPA sets forth two requirements for an “automatic telephone dialing system” – the capacity to store or produce random/sequential numbers, *and* the capacity “to dial *such* numbers,” meaning randomly or sequentially generated numbers. If future capacity is included, the second prong would be rendered surplusage. Since the relevant TCPA provisions only restrict calls, by definition the equipment has the capacity to dial *some* numbers. But the TCPA’s plain language requires more – a capacity to dial the randomly or sequentially generated or stored numbers. Only by concluding that “capacity” means “present capacity” can one avoid rendering this second prong superfluous, as all telephone equipment could dial additional numbers with sufficient future modifications. “It is [the Commission’s] duty to give effect, if possible, to every clause and word of a statute.”<sup>56</sup> Thus, the Commission should conclude that “capacity” means “present capacity.”

**B. The Commission Should Continue to Distinguish Between Informational and Telemarketing Calls.**

As the above discussion makes clear, the Commission should interpret “capacity” to mean “present capacity” when used in the TCPA or the Commission’s implementing regulations. However, the Chamber recognizes that doing so may undermine the Commission’s attempts to

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<sup>54</sup> *In re Ran*, 607 F.3d 1017, 1027 (5th Cir. 2010) (“The use of the present tense implies that the court’s establishment analysis should focus on whether the debtor has an establishment in the foreign country where the bankruptcy is pending at the time the foreign representative files the petition for recognition under Chapter 15.”).

<sup>55</sup> *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

<sup>56</sup> *Id.* (internal quotation marks omitted).

solve a problem identified in its *2003 TCPA Order* – telemarketers’ decreased reliance on randomly and sequentially generated telephone numbers in favor of lists of telephone numbers.<sup>57</sup> To avoid this problem, the Commission should provide for different treatment of informational, non-telemarketing commercial calls and telemarketing calls under the TCPA.

Such an action by the Commission would preserve consistency with the Commission’s prior practice. In the *2012 TCPA Order*, the Commission interpreted the term “prior express consent,” as used in the TCPA, to have different meanings when applied to informational calls as opposed to telemarketing calls. There, the Commission concluded that written consent was necessary for telemarketing calls, but oral consent was sufficient for non-telemarketing calls.<sup>58</sup> Consistent with the Commission’s desire not “to discourage purely informational messages,”<sup>59</sup> the Commission should take a similar approach here, interpreting “capacity” to mean “present capacity” when informational calls are being placed.

This action would also be consistent with the approach a number of courts have taken in examining autodialed calls to mobile phones. “[N]ot every text message or call constitutes an actionable offense; rather the TCPA targets and seeks to prevent ‘the proliferation of intrusive, nuisance calls.’”<sup>60</sup> Evaluating the circumstances of informational calls and “‘approach[ing] the problem with a measure of common sense’”<sup>61</sup> shows that different regulatory treatment is appropriate for these calls. This result is the same whether viewed as a question of the calls’ content (informational) or their context (consumers find them “highly desirable”).<sup>62</sup>

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<sup>57</sup> See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd. 14014, ¶ 132 (2003) (“*2003 TCPA Order*”).

<sup>58</sup> *Id.* *2012 TCPA Order* ¶¶ 20, 28.

<sup>59</sup> *Id.* ¶ 29.

<sup>60</sup> Order, at 4, *Ryabyshchuck v. Citibank (South Dakota) N.A.*, No.11-cv-1236 (S.D. Cal. Oct. 30, 2012) (quoting *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 745 (2012)).

<sup>61</sup> *Id.* (quoting *Chesbro v. Best Buy Stores, L.P.*, No. 11-35784, 2012 WL 4902839 (9th Cir. Oct. 17, 2012)).

<sup>62</sup> *Id.* at 5; see also *Ibey v. Taco Bell Corp.*, No. 12-cv-0583, 2012 WL 2401972, at \*3 (S.D. Cal. June 18, 2012) (“To impose liability under the TCPA for a single, confirmatory text message would contravene public policy and

Such an outcome would promote continued innovation in the way businesses communicate with their customers. Numerous companies are seeking to explore ways to better serve consumers on their smart-phones and wireless devices. Whether through mobile websites, “apps,” text message communications, or other services, today’s businesses are continuing to compete to provide their customers with better service. By clarifying that informational updates can be provided without incurring TCPA liability, the Commission will promote further innovative developments.

A Commission finding that “capacity” means “present capacity” with respect to informational, non-telemarketing commercial calls would provide much-needed clarity to American businesses, whose communications with consumers have been impeded by uncertainty about what constitutes “capacity” in the context of the definition of an automatic telephone dialing system. The Commission already has a robust set of decisions discussing the distinction between informational and telemarketing calls,<sup>63</sup> and courts have shown a willingness and ability to closely police the divide between the two.<sup>64</sup> Indeed, the Commission has already confirmed that the types of calls involved, “bank account balance, credit card fraud alert, package delivery, and school closing information,” are informational.<sup>65</sup> Thus, businesses will finally have the security of knowing that these calls will not result in a lawyer-driven TCPA class action claim for millions of dollars.

This decision would also benefit consumers. Today’s consumers are demanding that businesses provide them with time-sensitive information as soon as it becomes available. The Commission rightly concluded that, when businesses meet this demand, they provide “highly

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the spirit of the statute—prevention of unsolicited telemarketing in a bulk format.”).

<sup>63</sup> See, e.g., *2003 TCPA Order* ¶¶ 139-42 (discussing dual-purpose calls).

<sup>64</sup> See *Chesbro v. Best Buy Stores, L.P.*, No. 11-35784, 2012 WL 4902839 (9th Cir. Oct. 17, 2012) (evaluating whether a claimed “informational” call was in fact a telemarketing solicitation).

<sup>65</sup> *2012 TCPA Order* ¶ 21.

desirable” “services on which consumers have come to rely.”<sup>66</sup> By permitting businesses to make informational calls to consumers free from the threat of abusive class-action lawsuits, the Commission will further encourage these “highly desirable” services, to the benefit of everyone.

### **III. CONCLUSION**

The Chamber supports Commission action that clarifies that “capacity” means “present capacity” with respect to informational calls, and that continues to distinguish between informational, non-telemarketing commercial calls and telemarketing calls. By reaching this conclusion, the Commission can help curtail abusive lawsuits, provide American businesses with much-needed certainty, and continue to promote these highly desirable services for consumers.

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Respectfully submitted,



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William L. Kovacs  
Senior Vice President, Environment, Technology &  
Regulatory Affairs  
U.S. Chamber Of Commerce

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<sup>66</sup> *Id.* ¶ 29.